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In The

Supreme Court of the United States

October Term, 1993

JOHN LUMLEY,

Petitioner,

vs.

DIANA HOGSETT and DANIEL REWERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK E. HACKER
Counsel of Record for Respondents
2515 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 778-8844

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents, Diana Hogsett and Daniel Rewers, respectfully pray this Court deny the request of John Lumley to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 27, 1993, affirming the judgment of the United States District Court for the District of Wyoming entered upon a jury verdict.

MISSTATEMENT OF FACTS AND OMITTED FACTS WHICH BEAR UPON THE PETITION

Respondents respectfully submit to the Court factual matters which greatly change the nature of the arguments raised by the Petitioner.

Page 3 of the Petition states, "Rewers remained as the Sheriff's second-in-command in the department." While the statement was true for a period time, it is incorrect as it relates to the date on which the employment was lost. After the November, 1990, election, Quarberg ordered a reorganization of the sheriff's office, essentially allowing John Lumley to become the chief administrator and Lumley's designated future undersheriff to be his assistant. At that time, Rewers was removed of all administrative and supervisory authority and reassigned with the duties of a street deputy. Thus, Rewers' authority at the time of his discharge in January of 1991, when Lumley officially took office, was that of a street deputy. He had absolutely no policy-making or supervisory authority whatsoever. His responsibilities included making police patrols, enforcing the laws of the state, and following any orders or policies promulgated by his superiors. He reported his location and activity every 30 minutes to a dispatcher.

Rewers, prior to the discharge decision, had orally and in writing communicated to Lumley that he accepted the results of the election and would work cooperatively for Lumley. Lumley admitted in testimony that he had appropriate means to discharge or discipline Rewers in the event Rewers failed to carry out his job responsibilities, including any failure to abide by departmental policy. Rewers was a highly qualified street deputy whom the former sheriff, Quarberg, described as being "the best street deputy" he had ever seen.

While the Petition for Certiorari attempts to give the impression that the decision to terminate Rewers was related to his status as a candidate, that is a legal argument which does not match well with the facts of the case. Lumley testified that when he chose which deputies would continue in the department, he did *not* consider whether the individuals had been a candidate in the past, and he did *not* have any concern as to whether any of the employees might potentially be political candidates in the future. He did, however, admit that his criteria for continued employment was whether the employees were "personally loyal" to Lumley.

Lumley's complaints about Rewers' personal loyalty related to Rewers' exercise of free speech occurring long before Rewers became a candidate. In December, 1988, Quarberg received a routine citizen's complaint regarding a disagreement over the manner in which Rewers had conducted an investigation of a trespassing incident. At the same time, Quarberg received a complaint from Lumley that Rewers had been heard "bad mouthing" the Sheriff in the community. At that point, the investigation

concentrated on instances where Rewers had publicly criticized the Sheriff.

Lumley's complaint to the Sheriff about Rewers' speech occurred fourteen months prior to Rewers' January, 1990, announcement of a candidacy. The "bad mouthing" consisted of Rewers answering questions raised by citizens regarding his understanding of the reasons for certain actions of the Sheriff. Members of the community were aware of the acquisition of several large trucks which were believed to be fuel inefficient and limited in their usefulness. When the issue was raised Rewers agreed with those who were critical of the purchase. The sheriff's office participated in a state-organized drug task force involving combined resources of the state, county and municipal governments. Despite participation in that team activity, the department also conducted its own investigations. Rewers expressed opinions that such decisions were a duplication and waste of taxpayer money. Rewers likewise, acknowledged expressions of concern by citizens that being sheriff should be a full-time job. (Sheriff Quarberg was operating a farm while also serving as sheriff.)

These communications were made to members of the public in the context of community discussion of matters relating to the Sheriff's Department. It was never contended that such discussion compromised any investigation or other activity of the department. Even after Quarberg became aware that Rewers had expressed such opinions, the evidence demonstrated that the parties were still able to carry out the functions of the department.

When Rewers heard of the Sheriff's investigation, he arranged a meeting with the Sheriff using the assistance of the departmental chaplain, Reverend Parmater. During that meeting, the Sheriff eventually acknowledged the existence of the investigation, but insisted he would investigate anybody he wanted, at any time, for anything. Reverend Parmater specifically raised the question as to whether or not their differences would compromise their ability to work together in the department. Both men agreed that despite any differences of opinions, they were professional law enforcement officers who would continue to do their jobs.

The Petition fails to mention the Plaintiff's contention that the discharges of Rewers and Hogsett occurred in the context of a series of actions which have the effect of benefiting political supporters of Lumley and punishing employees who supported other candidates. The argument presented by the Plaintiff was not geared to the question of whether Rewers had been a candidate per se, but rather to the fact that political supporters were rewarded with positions, while those who supported other candidates lost their positions.

In the "reorganization" accomplished by Lumley, four employees lost jobs. All four had failed to support Lumley in the election. Diana Hogsett was known to be a close friend of Dan Rewers and had told John Lumley she was not going to vote for him. Richard Fairburn, a deputy who defeated Quarberg in the primary and opposed Lumley in the general election was also discharged. Mark Nelson, who had been a political supporter of Richard Fairburn, also lost his position. Rewers, who opposed Lumley was discharged. Four political supporters already

employed by the department received new benefits. Larry Mason was promoted to Undersheriff. Robert Phetteplace was promoted to an investigator. Cali Walker was promoted to jail supervisor. Cindy Magelky was given a salary raise.

Lumley hired Mike Raymond, his campaign chairman, to replace Dan Rewers even though Raymond was not certified as a police officer in Wyoming. Reba Odde, who had no experience with law enforcement, but had been a Lumley campaign contributor and political supporter, was hired into a new part-time secretarial job. The duties of that position were transferred from the position that was previously held by Diana Hogsett. John Black, who was not certified and had no law enforcement experience, but had been a Lumley campaign committee worker, was hired for a deputy position in the jail – the same position which Hogsett had earlier sought by a transfer. During the election, Lumley had declared that he had no problem with Diana Hogsett being transferred to that position, but after the election, he first declined to approve such a transfer and later discontinued Hogsett's employment entirely.

The Petitioner's Brief refers to a "reorganization" and gives the impression of an objective legitimate reason for the termination of Diana Hogsett. There was evidence before the jury, however, that the "reorganization" was a pretext for the termination of Hogsett. Diana Hogsett's responsibilities were secretarial, part-time back-up matron, and civil process. Lumley took the same secretarial duties performed by Diana Hogsett, transferred them to a new part-time secretarial position and hired a campaign worker, Reba Odde, to fulfill the new job. He

gave civil process responsibility to Cindy Magelky, another political supporter, providing a salary increase to compensate the additional responsibilities assigned to her. He refused to allow Diana Hogsett to be assigned to a vacant matron position in the jail. He likewise, declined to consider her for a second jail position which became available. Instead, he hired untrained, uncertified political supporters. Lumley admitted that the sheriff's office was obligated to purchase uniforms and to pay for training for the political supporters who were hired with the result that any ostensible savings from the abolition of Diana Hogsett's position were canceled by new costs.

The Petition also obscures the state law context in which these facts arose. The Petition suggests that Quarberg agreed Rewers and Fairburn could run for office. The Petition also refers to Quarberg's policy as being modeled after the "Hatch Act". The Petition fails to reveal the fact that Wyoming state election laws prohibited employment action against employees who filed as candidates. The evidence was that the Wyoming Secretary of State gave a legal opinion that Quarberg's policy would violate state law. Quarberg's agreement, in reality, amounted to acquiescence to the legal position of the Wyoming Secretary of State. The revised policy permitted employees to run for office, but prohibited disclosure of any confidential law enforcement matter and prohibited campaign activity while on duty.

I. THE PETITION INACCURATELY AND INCOMPLETELY REPRESENTS FACTS AND LAW APPLICABLE TO THE QUESTION OF PROTECTED POLITICAL ACTIVITY.

Page 12 of the Petition includes the following assertion:

> The Court of Appeals' decision in this case is the first to hold that a deputy sheriff has a right, protected by the First Amendment, to run for partisan political office against the sitting sheriff, and that, in practical effect, a newly elected sheriff is constitutionally required to appoint his political opponent as his deputy.

Status as a political opponent was not the pivotal fact in this case. John Lumley testified he never considered Rewers' past or potential future candidacy when he made the hiring decision. Lumley did consider Rewers' exercise of free speech in criticizing then Sheriff Quarberg and then Investigator Lumley, to interested citizens in the context of public discussion. That free speech exercise occurred fourteen months before any candidacy. It was Lumley's complaint about Rewers' free speech that led to Quarberg's "investigation" of Rewers.

Likewise, the Petition disregards the very strong circumstantial evidence of a pattern of employment decisions based on political support. Supporters were rewarded. Employees supporting other candidates were punished.

The argument also inaccurately portrays the Tenth Circuit's position. The argument makes reference to rehiring as a "deputy" and to "sworn deputies". The Tenth

Circuit relied squarely on *Dickeson v. Quarberg*. In that case, the Court thoughtfully discussed the appropriate measure of whether political activity by employees of a sheriff's office is constitutionally protected. The Court specifically rejected an analysis where the constitutional parameters were measured by a mere *title* in favor of an analysis of the employees' actual responsibilities and the necessity of political loyalty to perform those job functions.

The evidence was undisputed that at the time of the adverse decision by Lumley, Rewers had been reduced to the level of a patrol deputy with no policy-making or supervisory authority. At trial, Lumley was unable to explain why partisan political loyalty was necessary in order to carry out the routine functions of a police officer on the street. Petitioner cites *Elrod v. Burns*, 427 U.S. 347, 367 (1976) for the concept that public employers have an interest in political loyalty "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration". Lumley at trial acknowledged that Rewers had been cut out of all policy-making under the Lumley administration. He further acknowledged that if Rewers failed to follow any policies, ample provisions for discipline and discharge were available.

The Petition also inaccurately represents facts and law as they apply to Hogsett. Page 5 of the Petition represents that Hogsett told Lumley she was supporting Rewers "because she felt Lumley *was not qualified* to hold the office of sheriff". Page 13 of the Petition refers to "one who had expressed no confidence in his ability to hold office . . . " and asserts that Hogsett took the position

Lumley was "unqualified" to be sheriff. The actual statement by Hogsett, found at page 451(b) of Appellant's Appendix in the Tenth Circuit is significantly different. Hogsett testified she approached Lumley and informed him "that while he was my friend, I believed Dan was *more qualified* to be sheriff and that's who I would be supporting". Testimony by both Hogsett and Lumley was that they had a friendly and positive working relationship prior to that time. Lumley's testimony as to alleged reasons for her loss of employment related to "reorganization" and alleged excessive coffee breaks, *not* to any opinion on Lumley's qualifications.

The Petition also inappropriately attempts to analogize these facts to "Hatch Act" cases. (Petition pp. 12, 16) Both the district judge and the Tenth Circuit rejected the "Hatch Act" arguments as inapplicable to these facts. This case was not about an established regulation prohibiting certain specific kinds of political activity, but rather retaliation for employees engaging in political activities which were not only accepted, but legally protected as a matter of state law. Petitioners' Brief below acknowledged that the Wyoming Secretary of State had obtained an opinion from her counsel that Quarberg's political activity policy violated the State Election Code. The Brief recites at page 9 that:

> On July 19, 1990, the Secretary of State wrote to Quarberg, enclosing the opinion, stating that 'the policy is a clear violation of W.S. 22-26-119'.

Quarberg thereafter rescinded the prohibition and adopted a new procedure expressly authorizing such political activity. Nothing in the "Hatch Act" line of cases

justifies punishing employees who do not support a sitting sheriff in the context of a state legal system which permits and protects both political support and candidacy.

The failure of the Petition to accurately reflect the factual context of the speech and political support is compounded by failure to fully present the jury instructions given by the court. Petitioner suggests at page 15 that the Court of Appeals "failed to recognize or improperly applied . . . " the requirement to balance the employees' interest in speech against the employer's interest in business efficiency. A review of the jury instructions approved by the Tenth Circuit opinion demonstrates that all of the respective free speech considerations were appropriately applied.

Jury Instruction No. 7 placed the burden of proof on the Plaintiff to prove that retaliation occurred "because of his utterance of the protected speech, rather than the speech which was not protected".

Jury Instruction 8 explains that to be protected, the speech would have to relate to a matter of public concern. The Court in its instruction, observed that "when the speech is a matter of public concern, then this Court must balance the interest of a public employee when commenting on such matters and the interest of the employer in promoting the efficiency of its public services." The instruction further explained:

> In focusing on the effective functioning of the employer's enterprise, this court considers whether the statement impairs discipline by superiors, harmony among coworkers, has a

detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operations of the employer.

Within that, weighing these factors, the court finds that any speech of Plaintiff Rewers to members of the public regarding the failure of the Sheriff to be actively involved in the operations of the department, the duplication in effort involved with the drug task force and the Sheriff's Department, the fitness of the Sheriff's Department personnel to perform drug investigation activities, and the purchasing practices of the sheriff's office, including the purchase of vehicles, was constitutionally protected in this situation. All of the communication between Plaintiff Rewers and the Secretary of State are constitutionally protected. Statements of Plaintiff Rewers during the course of or in relationship to a political campaign regarding the performance or fitness of Sheriff Quarberg or the performance or fitness of Defendant Lumley are constitutionally protected.

What is not constitutionally protected is mere personal sniping or carping done for the sole purposes of complaining without an intent to influence a change in practice, policy or behavior. Speech comprising personal complaints of Dan Rewers, which related to matters of personal significance to Mr. Rewers are not constitutionally protected.

It is clear from the face of these jury instructions that the Court applied the prevailing constitutional doctrine excluding speech that was not of a public interest and

balancing the employee's right to speak against the employer's need for efficiency and harmony of operation. The District Court struck the balance at protecting speech referenced above, but excluding "personal complaints of Dan Rewers" and "merely personal sniping or carping". The instruction, thus, excluded the speech referenced on page 14 of the Petition to the effect that Rewers allegedly referred to Quarberg around the office as "an idiot" or "a son-of-a-bitch". Such statements were deemed *not* to be protected under the clear language of the Court's ruling and jury instructions. The judge clearly instructed the jury in regard to the Defendant's theory on that matter:

> On the other hand, Defendants Quarberg and Lumley alleged that they objected to Rewers' speech, which was not of public concern, but rather for his personal interest. They alleged Plaintiff Rewers engaged in personal attacks against Defendant Quarberg and that it was his later speech they found to be inappropriate.

The same instruction, no. 11, further states that when an employee "speaks as an employee on matters of only personal interest or personal gain, the speech is not protected". The instruction clearly indicated that it was the Plaintiff's burden to prove retaliation for the "protected speech, rather than the speech which was not protected".

In addition to distinguishing between protected and unprotected speech and balancing the employer's interest in efficiency, the Court provided specific further direction in relationship to political expression and association. The Court instructed the jury that:

> Where it is asserted that effective government requires the discharge or discipline of

> employees on the basis of their particular political association, expression or support, it is the Defendants' burden to prove that such loyalty was an appropriate requirement for the effective performance of the public office.
>
> The government must demonstrate an overriding interest in order to justify such actions. If the government has open to it a less drastic way of satisfying its legitimate interest, it may not choose actions that broadly stifle the exercise of fundamental personal liberties. The government must demonstrate that other less intrusive means to provide for effective government will not work. When there are doubts as to whether the government has shown its compelling interest, the case should be resolved in favor of the Plaintiffs.

The jury, the District Court and the Tenth Circuit all reached the conclusion that the Defendants had failed to demonstrate a need for political loyalty in the job responsibilities which were performed by these Plaintiffs. Quarberg agreed that throughout the time period these issues evolved, no situations occurred where investigations weren't performed, individuals were not incarcerated, documents and reports were not prepared, or any other significant failure to perform duties occurred. While there was disagreement among members of the office, that appeared to be based more on Sheriff Quarberg's personality and management style than any political campaign. One witness, Cindy Magelky an employee who testified she disliked Dan Rewers because of a personal disagreement unrelated to politics, documented the conversations and activities of Rewers and Hogsett with 200 notes written on sticky pads. At trial she admitted that not one

of her notes recorded a single incident in which a campaign related conversation or activity had occurred at the office. She also did not document any instance of criticism of the Sheriff. Even this most ardent critic of Plaintiff Rewers admitted Rewers performed his job in a professional manner.

During the transition period between the election and the installation of Lumley as sheriff, Rewers communicated directly to Lumley that Rewers intended to fulfill his responsibilities carrying out whatever tasks were assigned to him by Lumley.

II. THE DECISION IS GENERALLY IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT; DIFFERENT RESULTS IN CIRCUITS ARE LARGELY DRIVEN BY FACTUAL DIFFERENCES.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that employees of the Cook County Illinois Sheriff's Department could not be replaced because of their political party affiliation unless the employee held a policy-making position. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court further defined *Elrod* emphasizing that the question was whether political affiliations and beliefs are appropriate considerations for the effective performance of the public employees' duties. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), this Court held that public employee promotions, transfers and recalls after a lay-off could not be based upon political affiliation. In *Francia v. White*, 594 F.2d 778 (10th Cir. 1979), the Tenth Circuit held that deputy sheriffs in nonpolicy-making

positions who are adequately performing their jobs were protected under *Elrod*. After this Court decided *Branti* the Tenth Circuit followed this Court's ruling in *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).

Dickeson expressly followed *Branti* holding that a determination whether an employee of a sheriff's office can be discharged for political reasons turned upon a factual review of the employee's job responsibilities, rather than reference to an employee title. Thus, in *Dickeson* the Court reviewed the specific job responsibilities in determining the appropriateness of a political test for employees. When the Tenth Circuit reviewed this case, the Court directly applied *Branti* and *Dickeson* to the facts of this case.

It is critical to remember that Diana Hogsett was never a political candidate. At most, her political activity consisted of expressing a verbal preference for Dan Rewers and placing a yard sign at her house. Thus, none of the argument about the status of a political candidate or active political support even apply to Hogsett. Her job responsibilities are indistinguishable from employees found protected from *Elrod*, *Branti*, and *Rutan*.

As to Dan Rewers, the argument about the protected nature of candidate status does not correlate with the facts of this case. The evidence does not factually support the legal argument which Petitioner seeks to have this Court review. The case arose in a factual context of the promotion of supporters, the hiring of former campaign workers, and the dismissal of four employees who had supported other candidates. Lumley did not single out prior or possible future candidacy as any basis for his

decision. The results of his actions show a pattern of benefiting supporters and punishing those who opposed him. At the time of the election, Lumley was not the sitting sheriff, but rather was one of Rewers' fellow employees who also chose to run for office.

Petitioner's argument appears to be that there is something magic about the title of Deputy Sheriff which somehow obviates any closer analysis of the actual functions of the job. The Petition emphasizes the small nature of the Sheriff's Department and references "trust" and "confidence". To the extent those arguments are based upon concepts embodied in *Connick v. Meyers*, 461 U.S. 138 (1983) or *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court appropriately examined the facts of this situation including issues of working relationship and disruption, concluding that, on balance, the speech was protected. Reviewing the same facts, the Tenth Circuit upheld the Court's free speech balancing.

To the extent that the argument seeks to create some kind of per se rule that deputy sheriffs in small departments are never protected from political affiliation requirements, that argument is inconsistent with this Court's established law. In *Branti*, this Court reviewed a nine-person Public Defender's Office (smaller than the sheriff's office in this case). The *Branti* emphasis was upon the extent to which the discharged employees engage in policy-making related to "partisan political interests" and have access to confidential information "bearing whatsoever on partisan political concerns". *Branti*, 445 U.S. 519. *Branti* flatly rejected any general notion that mutual trust and confidence would exist only between members of the same political party in an

agency of small size. *Id.* at 520 n.14; *Jones v. Dodson*, 727 F. 2d 1329 (4th Cir. 1984); *Burns v. County of Cambria, PA*, 971 F.2d 1015 (3rd Cir. 1992).

While there are cases cited by the Defendant holding that the nature of the job of Deputy Sheriff justifies a political support test, those cases are not necessarily inconsistent with this one. In, *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), the Plaintiff in that case, unlike Rewers, supervised fifteen deputies and was involved in confidential political conversations with the sheriff. In fact, Joyner broke a political confidence of the sheriff reporting the sheriff's political plans to his opponent. Rewers was not a supervisor, was not privy to Lumley's political plans, and was not accused of breaking any confidence relating to any partisan matter.

Other circuit cases reach a different result based upon the negative effect of specific statements made in a campaign. *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988). In other cases, a Court reviewing the function of deputies within a specific state have found needs for political loyalty.

It is dangerous and erroneous to assume that the responsibilities of deputy sheriffs in respective jurisdictions are identical. It is also inappropriate to assume that state law provisions regarding participation in the electoral process are the same. The district judge, the jury, and the 10th Circuit have effectively determined that the job duties of a deputy sheriff in Wyoming are not such that partisan political loyalty is required. State law as applied by the Secretary of State recognized the right of

deputy sheriffs to run for office without adverse employment consequence. It, therefore, should not be surprising that the district judge, the jury and the 10th Circuit on review, all agreed that the nature of Dan Rewers' responsibility in Hot Springs County, Wyoming, did not require his personal political loyalty to John Lumley. There is a split in the circuits only when those circuits are reviewing the identical issue. In this case, both the factual and legal context can be distinguished from the other cases.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE DOCTRINE OF QUALIFIED IMMUNITY.

Defendant's argument about qualified immunity is largely premised on its misstatement of the facts of the case as a pure issue of the protection for a candidate. As referenced, Hogsett was never a candidate, and Rewers' candidacy per se was never asserted to be the basis for the termination by Lumley. The case was a free speech case and political support case. The free speech related to matters predating any candidacy status and political loyalty related to the wholesale political benefit of supporters.

The suggestion that the law was not decided sufficiently to hold Lumley liable in his individual capacity ignores the clearly established precedent of both this Court and the Tenth Circuit, which preceded the Defendant's actions. *Elrod, Branti,* and *Rutan* were all decided prior to the facts of this case. The Tenth Circuit has specifically applied the doctrine to deputy sheriffs in *Francia v. White, supra,* in 1979 and to this same sheriff's

office in Hot Springs County, Wyoming, in *Dickeson, supra,* in 1988. Lumley testified he was aware of the *Dickeson* decision and that he believed it would have been improper to dismiss any of the employees for their political support or activity. Lumley was not a poor public official exercising discretionary decision-making authority in an area where the legal principles were unclear. To the contrary, the principles were well established. They had been established and applied to this same sheriff's office in Wyoming. Lumley knew and recognized those rules.

CONCLUSION

Plaintiffs respectfully request this Court deny Defendants' Petition for Certiorari.

DATED this 10th day of January, 1993.

Respectfully submitted,

PATRICK E. HACKER
(Attorney of Record)
2515 Pioneer Avenue
Cheyenne, Wyoming 82001